

**Arbor Realty Funding LLC v Brooklyn Fed. Sav.
Bank**

2009 NY Slip Op 33026(U)

November 24, 2009

Supreme Court, New York County

Docket Number: 101058/09

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT **HON. CAROL EDMEAD**

PART _____

Index Number : 101058/2009
ARBOR REALTY FUNDING LLC
 VS.
BROOKLYN FEDERAL SAVINGS BANK
 SEQUENCE NUMBER : # 001
 SUMMARY JUDGMENT

Justice _____

INDEX NO. 101058-09
 MOTION DATE 9/11/09
 MOTION SEQ. NO. #001
 MOTION CAL. NO. _____

were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

The instant motion (sequence 001) is decided in accordance with the annexed Memorandum Decision. It is hereby

ADJUDGED and DECLARED that plaintiff Arbor Realty Funding LLC's (Arbor) motion, pursuant to CPLR 3212, for summary judgment in favor of plaintiff and against defendants Brooklyn Federal Savings Bank (Brooklyn Federal), East 51st Street Development Company LLC, 964 Associates LLC, Intervale Gardens LLC and Seiden & Schien, P.C. for the relief demanded in the amended verified complaint dated January 30, 2009 is granted, and it is further

ADJUDGED and DECLARED that plaintiff's rights under the purchase agreement are prior to, and paramount over, any rights defendant Brooklyn Federal may have; and it is further

ORDERED that the part of Arbor's motion seeking to dismiss defendant Brooklyn Federal's counterclaim is granted, and the counterclaim is severed and dismissed; and it is further

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

UNFILED JUDGMENT
 This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room _____)

Dated: _____

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

ORDERED that defendant Brooklyn Federal's cross motion, pursuant to CPLR 3212, for summary judgment in its favor on its counterclaim is denied, and it is further

ORDERED and **ADJUDGED** that the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this Order with notice of entry within twenty days of entry on counsel for defendants.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be given until the County Clerk obtains entry, counsel must appear in person to obtain entry.
14CPLR 101.1

Dated 11/24/09

ENTER: [Signature], J.S.C.

HON. CAROL EDMEAD

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35**

-----X
ARBOR REALTY FUNDING LLC,

Index No.: 101058/09

Plaintiff,

-against-

BROOKLYN FEDERAL SAVINGS BANK, EAST 51ST
STREET DEVELOPMENT COMPANY LLC, 964
ASSOCIATES LLC, INTERVALE GARDENS LLC
and SEIDEN & SCHIEN, P.C.,

Defendants.
-----X

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk
and notice of entry cannot be served based hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
1419).

Edmead, J.:

This is an action arising out of a dispute between two lenders over which has a superior perfected security interest in a certain 421-a Purchase Agreement (the purchase agreement) to obtain certain 421-a Negotiable Certificates.

Plaintiff Arbor Realty Funding LLC (Arbor) moves, pursuant to CPLR 3212, for summary judgment in its favor as against defendants Brooklyn Federal Savings Bank (Brooklyn Federal), East 51st Street Development Company LLC (East 51st), 964 Associates LLC (964 Associates), Intervale Gardens LLC (Intervale) and Seiden & Schien, P.C., for the relief demanded in the amended verified complaint dated January 30, 2009 (the complaint), wherein Arbor seeks a declaration that its rights under the purchase agreement are prior to, and paramount over, any rights defendant Brooklyn Federal may have. Arbor also moves to strike Brooklyn Federal's affirmative defenses and dismiss its counterclaim.

Defendant Brooklyn Federal cross-moves, pursuant to CPLR 3212, for summary judgment in its favor on its counterclaim, wherein Brooklyn Federal seeks a declaration that its perfected security interest in the purchase agreement is prior to and superior to that claimed by Arbor.

BACKGROUND

In or around May of 2007, Arbor made a series of mortgage loans to defendant East 51st (the Arbor loans). The Arbor loans totaled approximately \$70 million dollars and were secured by, among other things, certain mortgages encumbering certain real property, including the property known as 303-307 East 51st Street, New York, New York, Block 1344, Lots 103, 104 and 105 (the mortgaged property).

As additional security for the Arbor loans, on May 8, 2007, East 51st executed and delivered to Arbor an Assignment of Contracts, Permits and Other Rights (the assignment of contracts), wherein East 51st expressly assigned to Arbor all of its rights, title and interest in any and all present and future contracts and agreements executed by East 51st in connection with the mortgaged property.

Specifically, the assignment provision in the assignment of contracts stated, in pertinent part:

2. Assignment. As security for the payment and performance when due ... [East 51st] hereby assigns, transfers and pledges to Lender, and hereby grants Lender a security interest in, all of [East 51st's] right, title and interest, whether now owned or hereafter acquired, in to and under:

- (a) all agreements to which [East 51st] is a party executed in connection with the construction, operation, management, leasing, sale, maintenance and repair of the Property, including, without limitation, franchise agreements and agreements for the sale, lease or exchange of goods or other property, and/or the performances of services

(Arbor's Notice of Motion, Exhibit A, Assignment of Contracts, at 2).

In addition, section 2 (c) of the assignment of contracts also assigns to Arbor:

all licenses, permits, variances and certificates used in connection with the operation of the Property, including, without limitation, business licenses ...

licenses to conduct business, certificates of need and all such other permits, licenses and rights, obtained from any Governmental Authority or private Person concerning ownership, operation, use or occupancy of the Property

(*id.* at 2-3).

Sections 4 (a) and (d) of the assignment of contracts also prohibits East 51st from making “any changes in or amendments to any of the General Intangibles without the prior consent of Lender” or “assign[ing] or grant[ing] a security interest in any of the General Intangibles to anyone other than Lender” (*id.* at 4). Further, section 3 (a) of the assignment of contracts provides Arbor with the right to step into the shoes of East 51st with regard to any agreements entered into by East 51st with respect to the mortgaged property, thereby becoming a direct beneficiary of said agreements.

On May 11, 2007, in accordance with UCC Article 9, Arbor duly filed certain UCC-1 financing statements (the financing statements), which listed East 51st as the “Debtor,” with the office of the Secretary of State of Delaware, thereby allegedly perfecting its security interest in any and all contracts entered into by East 51st related to the mortgaged property (Arbor’s Notice of Motion, Exhibit B, Financing Statements). In the financing statements, Arbor described the collateral as including certain mortgages, as well as “all accounts receivable, contract rights, ... relating to the [mortgaged property]” (*id.*).

As put forth by Arbor, on July 24, 2007, Arbor advanced an additional \$4,000,000.00 to East 51st to enable East 51st to purchase certain 421-a certificates (the certificates). In order to promote affordable housing, the Department of Housing Preservation and Development (HPD) administers the 421-a Program (the program), which issues said certificates. The certificates grant various exemptions from real estate taxes. The certificates are transferable and re-

transferable, meaning they can be sold and resold on the open market for profit.

On June 5, 2007, defendant Intervale, as seller, entered into a 421-a Purchase Agreement with East 51st, as purchaser, to sell East 51st 250 certificates (the purchase agreement). It should be noted that the first page of the purchase agreement refers to the mortgaged property, as follows:

WHEREAS, [East 51st] is constructing improvements (the “Project”) on the property having a street address of 303 East 51st Street, New York, New York, Block 1344, Lots 103, 104 and 105 on the tax map of the City and County of New York (the “Purchaser’s Property”)

(Arbor’s Notice of Motion, 421-a Purchase Agreement, Exhibit C, at 1).

In addition, section 1 of the purchase agreement states that the certificates are “irrevocable documents ... which shall permit the residential apartment units in the Project ... to qualify for a partial exemption ... from real property taxes ... provided the Project and the [mortgaged property] meet all of the Program’s other requirements to be eligible for the Tax Exemption” (*id.* at 3).

In or about November of 2007, without notice to Arbor or Intervale, and without Arbor’s consent, East 51st executed an “Assignment and Assumption of Agreement,” wherein East 51st purported to assign and transfer its rights under the purchase agreement to defendant 964 Associates (the East 51st/964 Associates purchase agreement assignment) (Arbor’s Notice of Motion, Exhibit 1, Verified Complaint, ¶ 33). It should be noted that certain principals and/or agents of East 51st are also principals and/or agents for 964 Associates.

On November 9, 2007, defendant 964 Associates entered into a loan agreement with defendant Brooklyn Federal in the amount of \$18,825,000.00 (the Brooklyn Federal loan), to

facilitate the purchase by 964 Associates of certain real property located at 964 2nd Avenue, New York, New York (the 964 property). The 964 property is located directly adjacent to the aformentioned mortgaged property.

The Brooklyn Federal loan was secured by a mortgage with respect to the 964 property. As additional security for the Brooklyn Federal loan, pursuant to the “Collateral Assignment of Contract, Permits and Development Rights” (Arbor’s Notice of Motion, Exhibit A, Collateral Assignment of Contract, Permits and Development Rights), 964 Associates assigned and pledged to Brooklyn Federal all of its rights under the purchase agreement.¹

Pursuant to Article 9 of the UCC, Brooklyn Federal filed certain financing statements in the land records of New York County on November 14, 2007, and with the New York Secretary of State on November 15, 2007, thereby perfecting Brooklyn Federal’s security interest in, among other things, the purchase agreement.

On May 7, 2008, defendant East 51st defaulted under Arbor’s mortgage loan. In July of 2008, Arbor commenced a foreclosure action in the Supreme Court of the State of New York (*see Arbor Realty Funding, L.L.C. v East 51st Street Development Company, LLC*, N.Y. Co. Index No. 08-602186) (the foreclosure action). Accordingly, in a letter dated September 5, 2008, Arbor notified Intervale and Escrow Agent that it was electing to exercise its rights under the assignment of contracts and demanded that Intervale and Escrow Agent recognize Arbor as the true and lawful holder of the purchase agreement and all rights thereunder.

¹Although Arbor contends that the assignment of the purchase agreement to 964 Associates was invalid for lack of adequate consideration, Brooklyn Federal asserts that due consideration was given for the assignment in the granting of an easement and the right to use certain amenities intended to be built on the 964 property.

In a letter dated September 8, 2008, Escrow Agent advised Arbor that East 51st had assigned its rights as purchaser under the purchase agreement to defendant 964 Associates. Attached to said letter were copies of the purported assignment, as well as a June 11, 2008 letter from East 51st to Intervale and Escrow Agent which purported to give notice of said assignment.

On September 1, 2008, defendant 964 Associates defaulted under Brooklyn Federal's mortgage loan. Thereafter, Brooklyn Federal commenced an action to foreclose on the Brooklyn Federal loan. On September 4, 2009, Brooklyn Federal advised Escrow Agent of said default, as well as its intention to demand that Intervale tender performance under the purchase agreement to Brooklyn Federal. On October 20, 2008, Brooklyn Federal gave written notice to Intervale and Escrow Agent of 964 Associates's default and demanded that Intervale tender performance under the purchase agreement.

On December 19, 2008, Escrow Agent notified East 51st and 964 Associates that the certificates had been issued to Intervale and requested that East 51st identify the purchasing entity to which the certificates were to be transferred. Escrow Agent warned that if Intervale did not receive either notice or an agreement from the various parties, or a final, non-appealable order or judgment of a court of competent jurisdiction identifying the name of the entity to whom the certificates should be issued, then Intervale intended to draw upon the Letter of Credit, take the \$400,000.00 down payment and deliver the certificates into escrow.

On March 16, 2009, Intervale closed under the purchase agreement and delivered the certificates to Escrow Agent to be held in escrow pending a resolution of the conflicting claims between Arbor and Brooklyn Federal with respect to which party is entitled to the certificates.

Arbor commenced the instant action to establish that it is the rightful owner of the

certificates on the ground that it holds a prior perfected security interest in the purchase agreement, which is paramount over that which Brooklyn Federal purports to hold.

DISCUSSION

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion’s opponent to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact” (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Housing Corporation*, 298 AD2d 224, 226 [1st Dept 2002]).

Defendant Brooklyn Federal maintains that Arbor is not entitled to a declaration that its perfected security interest in the purchase agreement is prior to, and paramount over, Brooklyn Federal’s perfected security interest in the same, because Arbor never had a perfected security interest in the purchase agreement in the first place.

In support of this argument, Brooklyn Federal puts forth that East 51st’s interest in the purchase agreement was never intended to be included as one of the present or future contracts covered under the assignment of contracts. To this effect, Brooklyn Federal asserts that the certificates are not connected to the mortgaged property, because they are transferable and re-

transferable in nature. In addition, 250 certificates were purchased in this case, yet there are only 160 apartment units comprising the mortgaged property.

However, section 2 (a) of the assignment of contracts assigns to Arbor East 51st's right, title and interest in and to any and all present or future contracts and agreements executed by East 51st in connection with the mortgaged property. As such, the purchase agreement expressly ties the certificates and their use to the mortgaged property.

As noted previously, the first page of the purchase agreement refers to the mortgaged property. In addition, the purchase agreement also notes that, in the event that all of the program's requirements are met, the certificates will permit the mortgaged property's residential apartment units to qualify for partial exemption from certain real property taxes. Moreover, pursuant to the assignment of contracts, the certificates, which were obtained from "[a] Governmental Authority" also concern the "ownership, operation, use or occupancy of the Property operation, leasing and sale of the mortgaged property." To that effect, the resulting tax exemption provides beneficial real estate tax savings, which could affect the operation, sale and rental prices of the residential units.

Further, as set forth by Arbor, a review of certain emails between East 51st and Arbor reveals that it was East 51st and Arbor's intent that the assignment of contracts be amended so as to reflect the additional funding for the purchase of the certificates. This intent is also reflected in the First Amendment to Project Loan Agreement, which was executed on July 24, 2007, wherein it states:

[East 51st] is the owner of certain 421-a Negotiable Certificates pursuant to a certain Assignment and Acceptance by and between [Intervale], as Assignor, and [East 51st], as Assignee. [East 51st] shall promptly apply for the exemption and

abatement for real property taxes available pursuant to Section 421- (a) of the New York Property Tax Law, and, after such application, shall diligently pursue obtaining a certificate of eligibility for such exemption and abatement from the City of New York (the “Certificate of Eligibility”). When and if received, [East 51st] shall deliver the Certificate of Eligibility to [Arbor]. [East 51st] shall take all actions required in order to maintain the availability of Section 421 (a) real property tax exemption and abatements

(Arbor’s Notice of Motion, Exhibit 1, Amended Summons, at ¶ 28).

Brooklyn Federal also maintains that Arbor does not have a perfected security interest in the purchase agreement, because Arbor’s collateral description in the assignment of contracts was not specific enough to comply with the requirements of the UCC. Pursuant to UCC § 9-203 (b), enforceability against the debtor requires, among other things, that “the debtor has authenticated a security agreement that provides a description of the collateral.”

However, as to the sufficiency of the collateral description, with certain exceptions that do not apply herein, UCC § 9-108 (a) states that “a description of personal or real property is sufficient, whether or not it is specific, if it reasonably identifies what is described.” Some examples of reasonable identification include specific listings, categories and types of collateral, just as long as the identity of the collateral is “objectively determinable” (UCC 9-108 [b]; *General Electric Capital Commercial Automotive Finance, Inc. v Spartan Motors, Ltd.*, 246 AD2d 41, 52 [2d Dept 1998] [“[u]nder the UCC, the identification of a secured party’s collateral is adequate if it is reasonably specific. Normally, the designation of the generic type of collateral covered by a security agreement will be found to be specific (internal citations and quotations omitted)”]).

“[T]he purpose of judicial inquiry is solely to establish, first, whether the written description may be reasonably construed to include the disputed property and secondly, whether

the parties intended that the description include that property” (*id.*).

In reaching our determination that the assignment of contracts, which provides that the covered collateral includes “all accounts receivable, contract rights ... relating to the [mortgaged property],” was sufficient to give notice, we implement the policy of the UCC “that the law governing commercial transactions be simplified and modernized, and liberally construed to achieve that objective” (*TMMB Funding Corporation v Associated Food Stores, Inc.*, 136 AD2d 540, 542 [2d Dept 1988]).

It should be noted that, although a “[s]upergeneric description” of collateral such as “all the debtor’s assets” or “all the debtor’s personal property” do not sufficiently identify the collateral” (UCC § 9-108 [c]), here, the collateral described in the assignment of contracts is appropriately identified as those accounts and contracts specifically connected to the mortgaged property (*compare Fernandez v White Rose Food Company*, 13 Misc 3d 1204[A], 2006 NY Slip Op 51683(U) [Sup Ct, Bronx County 2006]).

In any event, as Arbor contends, Brooklyn Federal was at least on inquiry notice of Arbor’s secured interest in the purchase agreement. As set forth by the Court in the case of *Beneficial Finance Company of New York v Kurland Cadillac-Oldsmobile, Inc.* (32 AD2d 643, 645 [2d Dept 1969]):

The purpose of a notice-filing statute is to give protection to a creditor by furnishing to others intending to enter into a transaction with the debtor a starting point for investigation which will result in fair warning concerning the transaction contemplated.

(*see also TMMB Funding Corporation v Associated Food Stores, Inc.*, 136 AD2d at 52).

Here, Brooklyn Federal, which claims that it conducted a UCC search, admits that it was

provided with a copy of the East 51st/964 Associates purchase agreement assignment, as well as a copy of the purchase agreement itself, which indicated on the first page that it was tied to the mortgaged property. As such, Brooklyn Federal failed on its duty to contact Arbor, so as to inquire as to whether East 51st Street had granted a security interest in the purchase agreement to Arbor as collateral for the Arbor loans.

As a review of the record indicates that Arbor properly perfected a security interest in the purchase agreement, and since any purported interest that Brooklyn Federal has in the purchase agreement was not perfected until six months after Arbor had already perfected its security interest in the same, Arbor's rights under the purchase agreement are prior to, and paramount over, any rights that defendant Brooklyn Federal may have (*see Blue Heron Construction, LLC v Fiberglass Structures & Tank Company*, 49 AD3d 1225, 1226 [4th Dept 2008]; *Chemical Bank v B & S Woodworking Corporation*, 226 AD2d 123, 123-124 [1st Dept 1996]).

Thus, Arbor is entitled to summary judgment in its favor for the relief demanded in the amended verified complaint, wherein Arbor seeks a declaration that its rights under the purchase agreement are prior to, and paramount over, any rights that defendant Brooklyn Federal may have, as well as summary judgment dismissing Brooklyn Federal's affirmative defenses and counterclaim. Accordingly, defendant Brooklyn Federal is not entitled to summary judgment in its favor on its counterclaim, wherein Brooklyn Federal seeks a declaration that its perfected security interest in the purchase agreement is prior to and superior to that claimed by Arbor.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ADJUDGED and **DECLARED** that plaintiff Arbor Realty Funding LLC's (Arbor) motion, pursuant to CPLR 3212, for summary judgment in favor of plaintiff and against defendants Brooklyn Federal Savings Bank (Brooklyn Federal), East 51st Street Development Company LLC, 964 Associates LLC, Intervale Gardens LLC and Seiden & Schien, P.C. for the relief demanded in the amended verified complaint dated January 30, 2009 is granted, and it is further

ADJUDGED and **DECLARED** that plaintiff's rights under the purchase agreement are prior to, and paramount over, any rights defendant Brooklyn Federal may have; and it is further

ORDERED that the part of Arbor's motion seeking to dismiss defendant Brooklyn Federal's counterclaim is granted, and the counterclaim is severed and dismissed; and it is further


ORDERED that defendant Brooklyn Federal's cross motion, pursuant to CPLR 3212, for summary judgment in its favor on its counterclaim is denied, and it is further

ORDERED and **ADJUDGED** that the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this Order with notice of entry within twenty days of entry on counsel for defendants.

DATED: November 24, 2009

ENTER:



J.S.C.

HON. CAROL EDMEAD

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).